

A Wong Kim Cheng v Aidil Fahmy bin Zainal Abedin & Ors

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO
W-02(NCC)(W)-2229-09 OF 2012

B MOHD HISHAMUDIN, ABDUL AZIZ ABDUL RAHIM AND
MOHAMAD ARIFF JJCA

24 SEPTEMBER 2013

C *Companies and Corporations — Shares — Breach of trust of shares — Shareholder*
bought 390,000 of shares — Shares held in trust transferred to third parties with
assistance of company secretary — Whether transfer carried out in honest means —
Whether company secretary professionally negligent — Whether third parties
D *conspired in transfer of shares — Claim by shareholder dismissed by High Court —*
Appeal against decision of High Court — Whether trial judge correct in decision

E This was an appeal against the decision of the High Court in dismissing the
appellant's ('the plaintiff') claim against the respondents ('the defendants')
pertaining to 390,000 shares ('the shares') in Lekas Takzim Sdn Bhd ('the
company'). The shares were registered in the name of the first respondent ('the
first defendant') to be held on trust for the plaintiff. It was alleged that the first
defendant, in breach of that trust, and with the assistance of the fifth
respondent ('the fifth defendant') who was the company secretary, had
F fraudulently or dishonestly transferred the said shares to the second, third and
fourth respondents (second, third and fourth defendants, respectively). The
plaintiff's cause of action against the first to the fourth defendants was for
conspiracy while against the fifth defendant, the cause of action was
professional negligence. The plaintiff sought for, inter alia, declarations as to
rights over her share; for the first to the fourth defendants to make restitution in
G respect of those shares; and injunction to restrain the second, third and fourth
defendants from disposing or in any way, dealing with those shares. The first
defendant averred that he was the legal and beneficial owner of the shares and
was not holding them on trust for anyone. The second to fourth defendant, on
H the other hand, did not file any appearance nor attend the trial. The fifth
defendant admitted to carrying out the transfer of the shares on the instruction
of one Murali ('DW2') and based on the resolution of the board of directors of
the company. The claim was dismissed by the High Court and hence, the
present appeal.

I **Held**, allowing the appeal with costs:

- (1) The findings of the trial judge were erroneous and against the weight of evidence, resulting in miscarriage of justice. There was a resulting trust relationship between the plaintiff and the first defendant in relation to

the shares while the second to fourth defendants held the shares as constructive trustees for the benefit of the appellant. Evidence of the plaintiff succeeded in establishing on a balance of probabilities that the shares were hers and that the first defendant held them for her benefit; and that the first defendant had fraudulently or dishonestly transferred the shares to the second to fourth defendants, with the assistance of the fifth defendant (see paras 14–17).

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- (2) The plaintiff had adduced credible evidence that she had purchased a company called ‘Hancheer Corporation Sdn Bhd’ which was later renamed ‘Lekas Takzim Sdn Bhd’. In order to purchase the company, she had paid a sum of RM15,000 to the then company secretary. There was also credible evidence that the plaintiff acquired the shares of the company and that she paid the company RM475,000 for these shares through the issuance of a series of cheques which were all exhibited as evidence (see para 18).

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- (3) The first defendant, while on the one hand, asserted that the shares were his, yet, on the other hand, despite the position taken by the plaintiff that she acquired the shares by purchasing them from the company for RM475,000, avoided mentioning in his defence as to how he acquired the shares. When asked during cross-examination, the first defendant informed the court that the shares were a gift to him from DW2. Clearly, all the evidence brought forth by the first defendant were nothing but mere afterthoughts and blatant lies. DW2 was never the owner of the shares and since he wasn’t, how could he ever transfer the shares to the first defendant (see paras 54, 55 & 59).

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- (4) The defendant was liable for professional negligence as he could not have lawfully transferred the shares that were held in the name of the first defendant to the other three defendants without first obtaining the original share certificates from the first defendant or from the plaintiff. As a company secretary, he must or should have known that under the circumstances of the case, the board of directors of the company had no power either under the Companies Act 1965 or under the memorandum and articles of association of the company to cancel the original share certificates (see para 67).

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[Bahasa Malaysia summary]

Ini merupakan rayuan terhadap keputusan Mahkamah Tinggi dalam menolak tuntutan perayu (‘plaintiff’) terhadap responden-responden (‘defendan-defendan’) berkenaan 390,000 syer (‘syer-syer tersebut’) dalam Lekas Takzim Sdn Bhd (‘syarikat tersebut’). Syer-syer tersebut didaftarkan di bawah nama responden pertama (‘defendan pertama’) sebagai pegangan amanah untuk plaintiff. Didakwa bahawa defendan pertama, dalam pemecahan amanah tersebut, dan dengan bantuan responden kelima

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- A ('defendan kelima') yang merupakan setiausaha syarikat, telah secara menipu dan tidak jujur memindahkan syer-syer tersebut kepada responden kedua, ketiga dan keempat (defendan kedua, ketiga dan keempat). Kausa tindakan plaintif terhadap defendan pertama hingga keempat adalah konspirasi manakala terhadap defendan kelima, kausa tindakannya adalah kecuai profesional.
- B Plaintif memohon, antara lain, satu deklarasi hak-hak terhadap syer-syernya; bagi defendan pertama hingga keempat untuk membuat restitusi bagi syer-syer tersebut; dan injunksi untuk menghalang defendan kedua, ketiga dan keempat daripada melupuskan atau dalam apa jua cara, berurusan dengan syer-syer tersebut.
- C Defendan pertama menegaskan bahawa dia adalah pemilik sah dan benefisial syer-syer tersebut dan tidak memegangnya sebagai amanah untuk sesiapa. Defendan kedua hingga keempat, sebaliknya, tidak memfailkan kehadiran atau menghadiri perbicaraan. Defendan kelima mengaku menjalankan pemindahan syer-syer tersebut bawah arahan seorang yang bernama Murali ('DW2') dan berdasarkan resolusi lembaga pengarah syarikat.
- D Tuntutan ditolak oleh Mahkamah Tinggi dan oleh itu, rayuan ini.

Diputuskan, membenarkan rayuan dengan kos:

- E (1) Dapatan hakim bicara adalah terkhilaf dan bertentangan dengan berat keterangan, menyebabkan ketidakadilan. Terdapat hubungan amanah berbangkit antara plaintif dan defendan pertama berhubung syer tersebut manakala defendan kedua hingga keempat memegang syer-syer tersebut sebagai pemegang amanah konstruktif bagi manfaat perayu. Keterangan plaintif berjaya membuktikan atas imbalan kebarangkalian bahawa syer-syer tersebut adalah miliknya dan bahawa defendan pertama memegangnya bagi manfaatnya; dan bahawa defendan pertama telah secara menipu dan tidak jujur memindahkan syer-syer tersebut kepada defendan kedua hingga keempat, dengan bantuan defendan kelima (lihat perenggan 14–17).
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- G (2) Plaintif telah mengemukakan keterangan kredibel bahawa dia membeli syarikat yang dipanggil 'Hancheer Corporation Sdn Bhd' yang kemudiannya dinamakan 'Lekas Takzim Sdn Bhd'. Untuk membeli syarikat tersebut, dia telah membayar sejumlah RM15,000 kepada setiausaha syarikat ketika itu. Terdapat juga keterangan kredibel bahawa
- H plaintif mendapat syer syarikat tersebut dan bahawa dia membayar RM475,000 kepada syarikat bagi syer tersebut melalui pengeluaran satu siri cek-cek yang diekshibitkan sebagai keterangan (lihat perenggan 18).
- I (3) Defendan pertama, pada satu sudut, menegaskan bahawa syer-syer tersebut adalah miliknya, namun, pada satu sudut lain, walaupun hujahan yang dikemukakan oleh plaintif bahawa dia mendapat syer-syer tersebut dengan membelinya daripada syarikat dengan jumlah RM475,000, mengelak daripada menyatakan dalam pembelaannya akan bagaimana dia mendapat syer-syer tersebut. Apabila disoal ketika

pemeriksaan balas, defendan pertama memaklumkan kepada mahkamah bahawa syer-syer tersebut adalah hadiah daripada DW2 kepadanya. Jelas, kesemua keterangan yang dikemukakan oleh defendan pertama tidak lain tetapi sekadar fikiran semula dan penipuan semata-mata. DW2 tidak pernah menjadi pemilik syer-syer tersebut dan memandangkan dia bukan pemilik syer-syer, bagaimana mungkin dia boleh memindahkan syer-syer tersebut kepada defendan pertama (lihat perenggan 54, 55 & 59).

- (4) Defendan bertanggung bagi kecuaiian professional kerana dia tidak mungkin boleh memindahkan syer-syer tersebut yang dipegang di bawah nama defendan pertama secara sah kepada tiga defendan yang lain tanpa terlebih dahulu mendapatkan sijil syer asal daripada defendan pertama atau daripada plaintif. Sebagai setiausaha syarikat, dia mesti atau semestinya tahu bahawa dalam hal keadaan kes, lembaga pengarah syarikat tidak mempunyai kuasa sama ada di bawah Akta Syarikat 1965 mahupun memorandum dan tata urus persatuan syarikat untuk membatalkan sijil syer asal (lihat perenggan 67).]

Notes

For a case on breach of trust of shares, see 3(1) *Mallal's Digest* (4th Ed, 2013 Reissue) para 979.

Legislation referred to

Companies Act 1965

Appeal from: Civil Suit No 22 (NCC)–1195 of 2011 (High Court, Kuala Lumpur)

Lim Jit Kiong (Lam Kin Fei with him) (Melissa Ram & Associate) for the appellant.

G Balan (Balan Govind & Associates) for the first respondent.

Ashwida Abd Samad (Azman Sazira & Partners) for the fifth respondent.

Mohd Hishamudin JCA (delivering judgment of the court):

[1] This appeal is against the decision of the High Court of Kuala Lumpur of 14 August 2012 delivered after a full trial.

[2] At the High Court, the learned trial judge dismissed the plaintiff's claim. Hence, the plaintiff appeals to this court.

[3] We heard this appeal on 21 February 2013. We, unanimously, allowed the appeal.

A [4] We, now, give our reasons for our decision.

THE APPELLANT'S/PLAINTIFF'S CASE

B [5] The appellant's/plaintiff's case against the respondents/defendants is that she was the beneficial owner of 390,000 shares (held under share certificates No 023 & No 030) in a company called Lekas Takzim Sdn Bhd. The shares were registered in the name of the first respondent/first defendant (Aidil Fahmy) to be held on trust for the plaintiff; and that the first respondent/first defendant, in breach of that trust, and with the assistance of one Muralidharan (Murali) C (DW2) and the fifth respondent/fifth defendant (Saharudin), the company secretary, fraudulently or dishonestly transferred those shares to the second, third and fourth respondents/defendants (Khalid Izhar, Abdul Latiff and Mohamad Kassim, respectively).

D [6] The plaintiff's causes of action against the first to the fourth defendants are for conspiracy(to fraudulently or unlawfully transfer plaintiff's shares to the second, third and fourth defendants), for breach of trust and for restitution.

E [7] The plaintiff's cause of action against the fifth defendant is for professional negligence.

F [8] The plaintiff seeks the following reliefs: (a) for declarations as to her rights over those shares; (b) for the first to the fourth defendants to make restitution in respect of those shares; and (c) for damages to be assessed by the registrar.

[9] The plaintiff also seeks an injunction to restrain the second, third and fourth defendants from disposing or in any way dealing with those shares.

G THE DEFENCE OF THE FIRST RESPONDENT/FIRST DEFENDANT

H [10] The defence of the first respondent/first defendant is that he is the legal and beneficial owner of the shares in question and did not hold the shares on trust for anyone. He admits to engaging the professional services of the fifth defendant to transfer the shares to the second, third and fourth respondents.

THE POSITION TAKEN BY THE SECOND RESPONDENT/SECOND DEFENDANT, THIRD RESPONDENT/THIRD DEFENDANT AND I FOURTH RESPONDENT/FOURTH DEFENDANT

[11] The second, third and fourth respondents/second, third and fourth defendants did not file any appearance or statement of defence. They did not attend the trial.

[12] The second, third and fourth defendants were absent during the hearing of this appeal.

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THE DEFENCE OF THE FIFTH RESPONDENT/FIFTH DEFENDANT

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[13] The fifth respondent/fifth defendant, the company secretary of Lekas Takzim at the material time, admits to carrying out the transfer of the shares from the name of the first defendant to the names of the second, third and fourth defendants, on the instruction of Murali (DW2) and based on the resolution of the board of directors of Lekas Takzim. The fifth defendant, however, denies being professionally negligent in carrying out the transfer.

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THE DECISION OF THIS COURT

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[14] In our judgment, the findings of the learned trial judge, with respect, are erroneous and against the weight of evidence, thereby resulting in a miscarriage of justice. In our view, the circumstances of the case warrant appellate intervention.

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[15] We have examined the evidence and we are satisfied that, from the evidence adduced, the plaintiff (PW1) (Mdm Wong Kim Cheng) has succeeded in establishing on a balance of probabilities that the 390,000 shares in question are hers and that the first defendant held the shares on trust for her benefit; and that the first defendant, in breach of that trust, had fraudulently or dishonestly transferred the shares to the second, third and fourth defendants; the transfer facilitated by the professional negligence of the fifth defendant, the company secretary.

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[16] We hold that there is a resulting trust relationship between the plaintiff and the first defendant in relation to the 390,000; the first defendant being the trustee, and the plaintiff, the beneficiary.

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[17] We hold that the second, third and fourth defendants hold the 390,000 shares as constructive trustees for the benefit of the plaintiff; and must restore the shares to the plaintiff.

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THE PLAINTIFF'S EVIDENCE: IMPROPER EVALUATION OF THE PLAINTIFF'S EVIDENCE

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[18] In our judgment, the learned trial judge had failed to properly evaluate the evidence adduced by the plaintiff and her witnesses. The plaintiff has adduced credible evidence that she had on 14 December 2007 purchased

A acompany called 'Hancheer Corporation Sdn Bhd' that was later renamed as 'Lekas Takzim Sdn Bhd' ('Lekas Takzim') with a view to acquire roadwork projects from the Malaysian Government. In order to purchase this company, she paid a sum of RM15,000 to the then company secretary, one Pn Halilah bt Maskom. Of this payment of RM15,000, RM4,000 was paid in cash whilst the
B remaining RM11,000 was paid by cheque. She was able to exh RHB cheque No 591637 of RM11,000 dated 14 December 2007. PW1, subsequently, changed the company secretary from Pn Halilah to Norvic Corporate Services Sdn Bhd ('Novic'); as the owner of Novic, one Mr Tan Kee Huat, was a good friend of her husband, one Mr Soh Kay Kok (PW2).
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[19] There is credible evidence adduced as to how Mdm Wong acquired the 390,000 shares of the company in February and March 2008 via share certificate No 023 for 240,000 shares and share certificate No 030 for 150,000 shares; and that she paid the company (Lekas Takzim Sdn Bhd) RM475,000 for these shares through the issuance of the following cheques:
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- (a) RHB cheque No 591646 for RM170,000;
- (b) RHB cheque No 591648 for RM180,000;
- E (c) RHB cheque No 591653 for RM105,000; and
- (d) RHB cheque No 591664 for RM20,000

[20] She exhibited all the above four cheques as evidence.
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[21] The said 390,000 shares belonging to the plaintiff represent 30% of the share value of the company at that time (the company having 1,300,000 shares).
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[22] The plaintiff provides credible evidence as to why the shares were held in the first defendant's name. On the advice of her husband, Mr Soh Kay Kok (PW2), the said 390,000 shares were registered in the name of the first defendant, on instructions that the latter was to act as trustee and nominee for the plaintiff and to hold the said shares for the plaintiff's benefit.
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[23] The plaintiff said in evidence that PW2 and the late father of the first defendant were close friends, and PW2 trusted the first defendant. PW2 (her husband) assured the plaintiff that the first defendant would act on her instructions with regard to the shares.
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[24] In order to protect her interest as the beneficial owner of the said 390,000 shares, the plaintiff kept the original share certificates No 023 and No 030.

[25] Further, the plaintiff also procured the first defendant's duly signed undated resignation letter as director of the company. A

[26] The plaintiff kept the company's original RHB bank cheque book.

[27] PW2 (the plaintiff's husband) gave evidence corroborating what the plaintiff had said in evidence. He said the company was purchased by the plaintiff and RM475,000 was used to increase the share capital of the company. PW2 said the shares were registered in the first defendant's name so that the company would be a 'bumiputra' company. PW2 said he trusted the first defendant as he knew the first defendant's parents well. In fact he and the first defendant's late father, one Zainal Abidin, were close friends. The first defendant's late father had asked him (PW2) to 'help' his son (meaning, the first defendant) who then had just came back from studies in the United States. B C

[28] The first defendant was appointed a director of the company. It was agreed by the parties that the first defendant would be paid 5% of the profits derived from the dividends paid by the company. D

[29] PW2 testified that the company opened an account at RHB Bank Bhd, at the Bangsar Shopping Complex branch, and the plaintiff was the introducer as the plaintiff had an account at the same branch. E

[30] According to the evidence of PW2, the first defendant had pre-signed blank transfer forms, namely, Forms 32A, in relation to the 390,000 shares; and the forms were kept in escrow with the company secretary, Norvic. F

[31] In order to safeguard the expenditure of the company, the plaintiff kept the company's original RHB Bank cheque book. G

[32] PW2 also asked the first defendant to sign an undated resignation letter as director of the company.

[33] PW2 further gave evidence that he invited the following persons into the company: H

- (a) the second defendant (Khalid Izhar bin Mahmood);
- (b) one General (B) Dato' Sri Hj Sulaiman bin Mahmud; and
- (c) the third defendant (Abdul Latiff bin Mohamed AN). I

[34] The second defendant was invited and given free shares amounting to 5% of the shares of the company because he was the brother-in-law of the then Prime Minister.

A [35] General (B) Dato' Sri Hj Sulaiman purchased 5% of the shares of the company for RM200,000.

B [36] The third defendant (Abdul Latiff) also purchased 5% of the shares of the company but at a price of RM500,000.

C [37] Now, without the knowledge of the plaintiff, on 17 April 2009, the first, second, third and fourth defendants (all being directors of the company) terminated the services of Norvic as the company secretary and appointed the fifth defendant, Saharudin bin Mohd Basar, as the new company secretary for Lekas Takzim.

D [38] It is the plaintiff's case that, as the original share certificates for the 390,000 shares were not with the first defendant, the first, second, third and fourth defendants instructed the fifth defendant, Saharudin (as the new company secretary), to cancel the said share certificates of the plaintiff and issue new replacement share certificates to facilitate the illegal transfer of shares. In order to facilitate this purpose, the first defendant secured a resolution of the board of directors of the company (Lekas Takzim) dated 12 May 2009 to cancel share certificates No 023 and No 030.

F [39] Upon being informed that her shares in the company had been fraudulently (or dishonestly) and illegally transferred, the plaintiff lodged a police report and initiated the present action at the Kuala Lumpur High Court for the recovery of her 390,000 shares.

G [40] PW2 further said in evidence that, in July 2009, he, the first defendant and one Sharul Rizal bin Musa (PW3) met at a Starbucks Coffee House at Weld Supermarket. He confronted the first defendant and asked for the return of the plaintiff's shares and the latter agreed. PW2 also asked the first defendant to sign a letter dated 24 July 2009 addressed to the board of directors of Lekas Takzim which reads:

H I, Aidil Fahmy Bin Zainal Abidin (l/c No 770616-10-5179) a shareholder holding 390,000 ordinary shares of RM1.00 each representing 30% of the total shareholding in the Company write to inform that UNLESS a share transfer form and its related documents are presented to you BY MYSELF or MR. SOH KAY KOK PERSONALLY, you SHALL NOT register any transfer of my 390,000 ordinary shares in the Company should any signed share transfer form (Form 32A) purporting to be signed by myself is presented to the Company for registration.

I [41] PW2, subsequently, on 28 July 2009 went to the office of the fifth defendant bringing along and showing to the fifth defendant the original share

certificates No 023 and No 030, that were all along in the possession of the plaintiff, and urging the fifth defendant not to proceed with the transfer of the shares.

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[42] The fifth defendant, however, as the events later show, ignored his plea.

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[43] It is important to note that the evidence of PW2 is corroborated by the evidence of Sharul Rizal bin Musa (PW3). According to PW3, he and the first defendant were office colleagues as bank officers with Affin Bank Bhd, Kelana Jaya Branch, Petaling Jaya. He was introduced to PW2 by the first defendant at the Lake Club during a discussion on a business proposal. He said that sometime in July 2009 PW2 sought his assistance to look for the first defendant as the latter had refused to answer his (PW2's) phone calls. PW3 went to see the first defendant at the latter's work place and ensured that the first defendant went to see PW2 at the Starbucks Coffee House at Weld Shopping Complex. As to that meeting at Starbucks Coffee House, this is what PW3 said in evidence:

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Q3: Adakah Mr Soh memanggil kamu pada tahun 2009?

A3: Ya, Mr Soh memanggil saya untuk mencari Aidil Fahmy berjumpa dengan dia kira-kira bulan Julai ...

E

Di dalam pertemuan tersebut di mana saya juga turut menghadiri, Aidil bersetuju untuk memulangkan syer-syer yang dipegang oleh Aidil sebagai pemegang amanah. Dia berkata dia akan membuat mesyuarat di tempat setiausaha syarikat untuk memastikan syer-syer tersebut dikembalikan.

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[44] We accept the submission of learned counsel for the appellant/plaintiff that the learned trial judge, with respect, failed to give due consideration to above important piece of evidence of PW3.

G

ERRONEOUS FINDING OF FACT AS TO WHEN GENERAL (B) DATO' SULEIMAN BECAME DIRECTOR

[45] In our judgment, the learned trial judge, with respect, made an erroneous finding of fact when she said:

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[28] All this evidence does not support the Plaintiff's contention that Lekas Takzim was set up by her on 14 December 2007. The Plaintiff's contention that she set up Lekas Takzim is not credible given that General (B) Dato' Sri Haji Suleiman bin Mahmud was already a director since 26 November 2007.

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According to Soh, he invited General Dato' Sri Suleiman to join him after the company was set up. General Dato' Sri Suleiman could not possibly have been invited to join Lekas Takzim as claimed by Soh when the records show that he was already one of its directors ...

- A [46] We accept the submission of learned counsel for the appellant/plaintiff that based on Companies Commission of Malaysia (CCM) search results adduced in evidence, it is clear that the above finding cannot be correct. For the CCM search shows that General (B) Dato' Sri Haji Suleiman was only made a director of Lekas Takzim on 28 December 2007 and not on 26 November 2007 as erroneously found by the learned trial judge. With respect, this grave error by the learned trial judge had occasioned a serious miscarriage of justice.
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THE FIRST DEFENDANT'S EVIDENCE

- C [47] The first defendant's evidence is that he owned the 390,000 shares. He was in need of money for the expenses of his forth coming marriage. So, he approached PW2 for a loan of RM30,000. PW2 was agreeable to lend him the RM30,000 provided that the first defendant handed over to him the 390,000 shares as a security for the loan. The first defendant handed over the shares certificate to PW2, as asked. However, PW2 failed to give him the RM30,000.
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- E [48] He orally asked PW2 for the return of the shares but PW2 refused to do so. He did not lodge a police report; nor did he issue a written notice to PW2 for the return of the shares.

- F [49] The first defendant then approached the second, third and fourth defendants to obtain RM30,000 for his marriage expenses. They agreed to provide him the money in exchange for the shares.

- G [50] It is the evidence of the first defendant that a sum of RM30,000 was given to him by the second, third and fourth defendants through Murali (DW2). The first defendant did not elaborate in his evidence as to the precise amount that each of the three defendants gave him; nor did he explain as to why the money was not given directly to him by the three defendants.

- H [51] It is the evidence of the first defendant that although he gave his 390,000 shares to the second, third and fourth defendants in order to secure from them a sum of RM30,000, he did not know the value of his shares.

- I [52] According to the first defendant, he was unable to transfer the shares to the three defendants, since the shares certificates were kept by the PW2. He informed the board of directors of Lekas Takzim of the matter; and the board then directed the company secretary (the fifth defendant) to cancel the share certificates No 023 & No 030, and to issue three new certificates. With the new certificates, on 12 May 2009, the first defendant, with the assistance of the fifth defendant (the newly appointed company secretary) transferred the 390,000 to

the second, third and fourth defendants in the following manner:

- (a) 97,500 shares to the second defendant (Khalid Izhar);
- (b) 97,500 shares to the third defendant (Abdul Latiff); and
- (c) 195,000 shares to the fourth defendant (Mohammad Kassim)

[53] However, the fifth defendant, as the company secretary, effected the stamping of the transfers only on 29 December 2009. The registration of the transfers in the share register of the company was effected by the fifth respondent only after the stamping was done.

IMPROPER EVALUATION OF THE FIRST DEFENDANT'S EVIDENCE

[54] In our judgment, the learned trial judge, with respect, fails to make a proper evaluation of the evidence, before accepting the evidence of the defendants and the defence witnesses; in particular, the evidence of the first defendant. The first significant thing to note is that the first defendant, while on the one hand asserts that the shares were his, yet, on the other hand, despite the position taken by the plaintiff (that she acquired the shares by purchasing them from the company for RM475,000) avoids mentioning in his statement of defence as to how he acquired the 390,000 shares. Even in his examination in chief he merely said that he acquired the shares from one Murali (DW2). This is his evidence:

Q17: Kamu telah mengakui bahawa kamu pernah memiliki sejumlah 390,000 saham dalam Lekas Takzim Sdn Bhd. Bagaimanakah kamu boleh memperolehi saham-saham tersebut?

A: Saya memperolehi saham-saham tersebut daripada Muralidharan a/l Mailvaganam.

[55] But, remarkably, the first defendant avoids explaining as to how he acquired the shares from DW2. In cross-examination, however, when pressed for an explanation by learned counsel for the plaintiff, as to how he acquired the shares from DW2 (as he alleged), he endeavoured to give an explanation: he said that the shares were a gift to him from DW2. When asked again by learned counsel for the plaintiff to confirm his answer — that it was a gift from DW2:

Q19: Satu hadiah kamu mengatakan?

the first defendant was not able to give a firm answer. For, he merely answered vaguely and briefly in the following manner:

A: Saya rasa begitu.

A [56] What does he mean by '*rasa begitu*? Was it really a gift from Murali (DW2)? Or, was it not? And, if, indeed, it was a gift from DW2, what made Murali (DW2) to give him the shares as a gift? There was, however, no clear explanation from the first defendant.

B [57] Indeed, he was asked:

Q47: Tadi Encik Aidil mengatakan Encik Murali yang memberikan syer kepada kamu. Encik Murali tidak memegang apa-apa syer dalam syarikat. Oleh itu kenapa dia memberikan syer tersebut kepada kamu?

C A: Sebab bapa beliau adalah kawan bapa saya. Jadi kami sudah kenal agak lama. Jadi mungkin disebabkan syarikat memerlukan Bumiputra interest jadi tawarkan kepada saya.

D Clearly, this is an evasive and meaningless answer.

E [58] Other aspects of the first defendant's evidence that to our mind further undermine his credibility are these. Firstly, if, indeed, the 390,000 shares were really his, how is it that he did not bother to find out the value of the shares before transferring them to the said three defendants? Secondly, why must the RM30,000 be given to him — not directly by the three defendants — but via Murali (DW2)? Thirdly, why is there no evidence as to how much each of the three defendants gave him? Thirdly, if, indeed, the RM30,000 was given to him by the second, third and fourth defendants via Murali (DW2), then, why is it that DW2 made no mention of this alleged fact in his evidence?

G [59] In our judgment, clearly all the above evidence is nothing but mere afterthoughts and blatant lies. Murali (DW2) was never the owner of the shares. If he was never the owner of the shares, how could DW2 ever transfer the shares to the first defendant. In any case, DW2, in his evidence, had never said anything about having transferred any Lekas Takzim shares to the first defendant either as a gift or otherwise.

H [60] DW2 gave evidence that he was the general manager of Lekas Takzim from its inception until 2009. He resigned in 2009 after he was declared a bankrupt. Thereafter he became a 'runner' for the company. He knew PW2 and the first defendant. In fact he was a friend of the first defendant. He also knew first defendant's first witness, one Muhammad Hafizal (DW1).

I [61] DW2, on the instruction of the first defendant, played an active role in the transfer of the shares from the first defendant to the second, third and fourth defendants. DW2 was the person who gave instruction to the fifth defendant to prepare a board of directors' resolution for the appointment of the

fifth defendant as the company secretary in place of Norwich, and for the transfer of the shares from the first defendant to the second, third and fourth defendants. A

[62] But, interestingly, Murali (DW2) has a different story to tell as to how the first defendant acquired the shares. According to DW2, the first defendant acquired the shares from one Muhammad Hafizal (DW1) without any payment in the following manner: B

Q41: Saya merujuk kepada jawapan kamu kepada Soalan 13 Penyata Saksi. Yang saham yang dipegang oleh Encik Aidil ini, siapa pemilik saham tersebut? C

A: Aidil Fahmy.

Q42: Adakah dia membayar untuk mendapatkan saham tersebut?

A: Tidak. D

Q43: Dia mendapat secara percuma?

A: Ya.

Q44: Kenapa Aidil mendapat secara percuma?

A: Muhamad Hafizal beli daripada SU Secretarial Service, straightaway dia masukkan nama ke dalam syarikat itu. E

[63] Muhammad Hafizal (DW1) is the first witness called by the first defendant. At the material time he was a shareholder of Lekas Takzim. He claimed to have purchased the company for RM15,000 (but when cross-examined was not able to furnish evidence of such payment). He alleged he did not know PW2; but claimed to be a close friend of Murali (DW2). But there is nothing in the evidence of Muhammad Hafizal (DW1) stating that he registered the shares of Lekas Takzim in the name of the first defendant. F G

ERRONEOUS FINDING OF THE LEARNED TRIAL JUDGE AS TO HOW THE FIRST DEFENDANT ACQUIRED THE SHARES

[64] In spite of the foregoing evidence, the learned trial judge, however, made the following finding: H

[29] On the ownership of the shares, the first defendant's version is more plausible as it is supported by contemporaneous documentary evidence. The 1st Defendant claimed that he had acquired his total volume of 390,000 Lekas Takzim shares from one Zakariah bin Osman on 11 April 2008. I

[65] With respect, this is an erroneous finding by the learned trial judge. As we have seen above, the first defendant's version is that he acquired the 390,000

A shares from Murali (DW2) as a gift. We have closely examined the evidence of the first defendant. In his entire evidence, the first defendant makes no mention of one 'Zakariah bin Osman'. Thus, we respectfully asked: how is it possible for the learned trial judge to say that she found the first defendant's version to be 'more plausible'?

B
LIABILITY OF THE SECOND, THIRD AND FOURTH DEFENDANTS

C [66] As we have made a finding that the transfer of the shares by the first defendant to the second, third and fourth defendants were fraudulent or dishonest, it follows that the second, third and fourth defendants did not acquire any rights in the shares. They thus hold the shares as constructive trustee for the benefit of the plaintiff; and must restore the shares to the rightful owner — the plaintiff.

D
LIABILITY OF THE FIFTH RESPONDENT

E [67] Now, moving on to the fifth defendant, in our judgment, we find the fifth defendant liable in professional negligence. He could not have lawfully transferred the shares that was held in the name of the first defendant to the other three defendants without first obtaining the original share certificates from the first defendant (or from the plaintiff). He knew the share certificates were with the plaintiff, as he was told of this fact by PW2. As a company secretary he must or should have known that under the circumstances of the case the board of directors of Lekas Takzim had no power either under the Companies Act 1965 or under the memorandum and articles of association of the company to cancel the original share certificates No 023 and No 030 and to issue three new certificates.

G
ORDER OF THIS COURT

H [68] At the earlier part of our judgment, we have already stated our decision and findings based on the evidence. Accordingly, we now grant the plaintiff the following remedies/reliefs. As against the first defendant:

- I (a) we grant a declaration that the first defendant held the share certificates No 023 and No 030 on trust for the plaintiff; and
- (b) we grant a declaration that the first defendant had acted fraudulently or dishonestly in transferring the said shares to the second, third and fourth defendants.

[69] As against the second, third and fourth defendants:

- (a) we grant a declaration that the second, third and fourth defendants are

liable to make restitution to the plaintiff in respect of the plaintiff's shares that have been fraudulently or dishonestly transferred to them by the first defendant;

A

- (b) we grant a declaration that the transfers of the said shares from the first defendant to the second, third and fourth defendants are illegal and null and void; and

B

- (c) we, accordingly, make an order that the Form 32A forms in respect of the transfers referred to in (b) above be cancelled.

[70] As against the fifth defendant, we grant a declaration that the fifth defendant's act of cancelling the Lekas Takzim share certificates No 023 and No 030 is null and void.

C

[71] As against all the defendants:

D

- (a) we make an order that all shares of Lekas Takzim Sdn Bhd, derived from share certificates No 023 and No 030, now held by the second, third and fourth defendant's as constructive trustees, be delivered to the plaintiff forthwith; and

- (b) we make an order that general damages (if any) be assessed by the registrar of the High Court.

E

[72] We award the appellant/plaintiff costs of RM40,000 as against each of the first respondent/first defendant to the fourth respondent/fourth defendant.

F

[73] We award the appellant/plaintiff costs of RM20,000 as against the fifth respondent/fifth defendant for here and below.

Appeal allowed with costs.

G

Reported by Afq Mohamad Noor

H

I